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Supreme Court of the United States
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October Term, 1969

No. [redacted]-89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AEMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1189

ALTON J. LEMON, *et al.*,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, *et al.*,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

The statute under attack is Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, 24 P.S. (Purdon, Supp. 1969) §5601, *et seq.* (referred to herein as "the Act"). The scheme of the Act is that, from funds derived from a tax on flat and harness racing, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania is authorized to cause the Treasurer of the Commonwealth to reimburse nonpublic schools by cash or draft, for the cost to those schools of teachers' salaries, textbooks, and teaching materials in the fields of mathematics, modern foreign languages, physical sciences, and physical education for the preceding year.

Over $5 million is now being paid by the Commonwealth of Pennsylvania in installments, which commenced with the first payment in September, 1969, for reimbursement for costs incurred by the nonpublic schools for the preceding academic year, 1968-69. Appellants' complaint, which requested a three-judge court, sought a preliminary and final injunction restraining the appropriate officials of the Commonwealth from making any payments under the Act to the seven church-affiliated schools named as defendants, which were alleged to be typical of virtually all the schools receiving aid. Of the pupils in the private schools of Pennsylvania, 96.6 per cent attend church-affiliated schools.[1] The complaint alleged that the statute, on its face and as

1. *Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966*, Office of Education, U. S. Dept. of Health, Education and Welfare, OI-20111.

applied, authorizes payment to sectarian educational institutions controlled by churches, having as their purpose the teaching and propagation of a particular religious faith in conducting their operations, curricula, and programs to fulfill that purpose; and further alleged that the overwhelming proportion of the recipient schools are attended overwhelmingly by white students. With respect to the fact that these schools are the organs and instrumentalities of churches and religious groups, the complaint alleged that the statute violates both the Establishment and Free Exercise Clauses of the First Amendment and that, insofar as the Act authorizes the payment of funds to racially segregated schools, it violates the Equal Protection Clause of the Fourteenth Amendment.

With respect to the violation of the clauses on religion in the First Amendment, the complaint made certain specific allegations of fact. It alleged a violation of the Establishment Clause in that the Act provides for direct financial aid out of state funds to sectarian schools, that it finances and participates in the blending of sectarian and secular instruction, and that it has as its purpose and primary effect the advancement of religion. The Free Exercise Clause was alleged to be violated by reason of the fact that the statute constitutes taxation for the support of religion.

The complaint was filed on June 3, 1969, together with a Motion for Preliminary Injunction and an Order for the appointment of a three-judge court. On July 7, 1969, appellants filed interrogatories and a Motion to Produce under Fed. R. Civ. P. 34 upon defendant schools. All dis-

covery was subsequently stayed pending disposition of several motions by defendants below, including motions to dismiss the complaint for failure to state a claim and for lack of standing. On November 28, 1969, after briefs and argument, the District Court dismissed the complaint, Chief Judge Hastie dissenting. The majority held that some of the plaintiffs lacked standing to complain about violation of the religion clauses of the First Amendment and that the remaining plaintiffs, while having such standing, had failed to state a cause of action. Insofar as the complaint charged a violation of the Equal Protection Clause, the court held that all plaintiffs lacked standing to raise this issue.

Interest of the *Amici*

This brief is submitted in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress
Anti-Defamation League of B'nai B'rith
Conference of American Rabbis
National Council of Jewish Women
Union of American Hebrew Congregations

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that

the program provided for in the statute under review is a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

In addition, these organizations, which have consistently fought for equal opportunities for all, regardless of race, color, creed or national origin, and which have always opposed racial segregation in schools, believe that grants of public funds to private schools as authorized by the Act will further stimulate the trend toward racial segregation in the schools of Pennsylvania, with private schools attended almost exclusively by white pupils and the public schools attended by most of the nonwhite children. The *amici* view this effect of the Act as a violation of the Equal Protection Clause of the Fourteenth Amendment.

The Questions to Which This Brief Is Addressed

This brief *amici curiae* is addressed to the following questions:

1. Does the Act violate the Establishment Clause of the First Amendment because it provides state support for the propagation of religion?

2. Does the Act violate the Establishment and Freedom of Religion Clauses of the First Amendment because it permits an improper commingling of church and state?

3. Does the Act, insofar as it authorizes the payment of public funds to private schools which are racially segre-

gated, violate the Equal Protection Clause of the Fourteenth Amendment?

4. Do the plaintiffs or any of them have standing to raise the question as to Equal Protection?

Summary of Argument

I. The Act violates the Establishment Clause of the First Amendment because it provides state support for the propagation of religion.

A. The Act permits the financing of schools which weave sectarian teaching into the instruction of secular subjects. On the allegations of the complaint in this case, such interweaving does occur in at least some of the schools covered by the Act.

B. Even if the instruction financed by the Act is purely secular, the Act assists church-controlled schools by relieving them of financial burdens they would otherwise have to carry. It thereby has the effect of advancing the religious instruction which is the principal purpose of these schools.

II. Government financing of secular instruction in religiously affiliated schools results in a commingling of church and state in a manner prohibited by the Establishment and Freedom of Religion Clauses of the First Amendment. It necessarily requires state supervision of the financed operations. In particular, it involves the state in day-to-day determinations of whether secular instruction is being given in the sectarian schools in a sectarian manner. This necessarily subjects the state to conflicting pressure from various

religious and nonreligious groups not only as to the manner in which the responsibility of supervision is performed but also as to the choice of officials to be charged with that responsibility.

III. The Act also violates the Equal Protection Clause of the Fourteenth Amendment in perpetuating racial segregation in the education system of Pennsylvania. As statistics show, education in Pennsylvania is largely segregated in that private schools are mostly white while most of the Negro children attend public schools. By supporting private schools, the Act aggravates this segregation. Since this support constitutes state action, it falls squarely within the prohibition of the Equal Protection Clause of the Fourteenth Amendment.

IV. The plaintiffs have standing to raise the question of equal protection. At least one of them is the father of a child attending a public school and thus is directly affected by the aggravation of racial segregation resulting from the Act.

ARGUMENT

POINT I

The Act violates the Establishment Clause of the First Amendment because it provides state support for the propagation of religion.

The precise meaning of the Freedom of Religion and No-Establishment Clauses of the First Amendment, like other broad constitutional guarantees, has always been and probably always will be subject to dispute. Until recently, however, it has been accepted almost without question, by

state legislatures as well as by Congress, that constitutional doctrine bars the direct transfer of tax-raised funds to institutions established for the propagation of religion. It was that assumption that was expressed by this Court in its classic statement in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), since repeatedly reaffirmed (most recently in *Board of Education* v. *Allen*, 392 U. S. 236, 242 (1968)), that:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

As this Court said in *Walz* v. *Tax Commission of the City of New York*, 90 S. Ct. 1409, 1411 (1970):

> It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.

During the past 50 years, a few practices that were challenged by some as violating that concept—such as free busing and the lending of textbooks—have been accepted in some states. But not until very recently has it been seriously contended that taxpayers could be compelled to contribute to massive financing of church-related schools, and ultimately to the financing of all aspects of such schools except specifically religious instruction.

We submit that the separation principle clearly bars such financing and that this case provides an opportunity for this Court to make that clear.

In *Abington School District* v. *Schempp*, 374 U. S. 203, 222 (1963), this Court stated the following test for deter-

mining whether action by a state violates the Establishment Clause:

> • • • what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

This test was applied by this Court in *Board of Education* v. *Allen, supra,* in upholding the lending of state-owned textbooks for use in religiously affiliated schools. It seems also to have been applied, although without specific reference, in *Walz* v. *Tax Commission of the City of New York, supra,* upholding tax exemption for churches.

Despite efforts to treat this "purpose and effect" test as a replacement of the interpretation of the Establishment Clause in *Everson,* it remains true that, as this Court reiterated in *Allen* (392 U. S. at 242), the Clause bars any "tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We submit that this prohibition is violated by the transfer of state funds for the support of a religious school, regardless of what aspect of the school's operations is to be financed. We submit further that such a transfer doubly violates the test laid down in the *Schempp* case in that it has both the purpose and the effect of aiding religion. (As we show in Point II below, it also violates the "commingling" test suggested in *Walz.*)

A. The Act Finances the Sectarian Teaching of Secular Subjects.

1. It is standard practice in at least some nonpublic schools to teach religion with secular subjects.

Only recently, in its decision in *Walz, supra,* this Court referred to the efforts of particular religions "to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age" and observed (90 S.Ct. at 1412-13) that

> No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools.

For the Catholic Church, in particular, parochial schools are viewed as an instrumentality for the propagation of religion through all aspects of their day-to-day operations.[2] The authority for this view was described by Justice Jackson in his dissenting opinion in *Everson, supra,* 330 U. S. at 22-24. The Catholic parochial school system is predicated on the sections of the Canon Law there quoted by Justice Jackson. The encyclical of Pope Pius XI *On the Christian Education of Youth* states that the "only school approved by the Church is one where * * * the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] by the Christian spirit."[3]

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2. Because the court below dismissed the complaint without a hearing on controverted questions of fact, appellants had no opportunity to prove the sectarian nature of instruction in the subjects and schools affected by the Act. As we show below (pp. 14-17), it must therefore be assumed that at least some financing of sectarian instructions is permitted by the Act.

3. Redden and Ryan, A Catholic Philosophy of Education, 107, 118 (1942).

These words of the Pope epitomize the whole Catholic philosophy of education and the educational foundation of the Catholic parochial school system. Catholic doctrine does not conceive of religion as a subject which, like history or music, can be taught more or less independently of other subjects a specified number of school hours weekly; in the Catholic school, religion is not merely a branch in the curriculum, nor is it confined to mere instruction. The ultimate goal of education is the praise, reverence and service of God; and everything else in education must be subordinated and directed toward this ultimate end.[4] This leaves no place for purely secular instruction in the Catholic school; indeed, the term "secular education" is almost self-contradictory in such schools. Everything taught in the Catholic school is taught with the ultimate goal of religious education in mind—everything must be impregnated with God and religion. As stated by the Reverend Joseph H. Fichter, S.J., in an authoritative book published in 1958:

> It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half hour period of the day. Even arithmetic can be used as an instrument of pious thought, as in the case of the teacher who gave this problem to her class: "If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?"[5]

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4. *Id.* at 29.

5. Fichter, *Parochial Schools: A Sociological Study*, 86 (1958).

This conclusion was reached by the Supreme Court of Oregon in *Dickman* v. *School District*, 232 Ore. 238, 243 (1962):

> The evidence establishes, and the trial judge found, that the purpose of the Catholic church in operating St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the Archdiocese of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.

The same thought has been expressed by Catholic educators. Thus, Monsignor John A. Ryan has stated:

> Since the Church realizes that the teaching of religion and instruction in the secular branches cannot rightfully or successfully be separated one from the other, she is compelled to maintain her own system of schools for general education as well as for religious instruction.[6]

The same point was made by the Supreme Court of Vermont in *Swart* v. *South Burlington Town School District*, 122 Vt. 177, 187-8, 167 A. 2d 514, 520 (1961):

> In this instance the defendant school board has elected to discharge its duty by furnishing secondary education outside the public facilities of the district. For a substantial number of its advanced students at

6. Quoted in 2 A. Stokes, *Church and State in the United States* 654 (1950).

least, the legal and public duty of the district is undertaken in religious denominational high schools that are an integral part of the Roman Catholic Church. The Church is the source of their control and the principal source of their support.

This combination of factors renders the service of the Church and its ministry inseparate from its educational function. That this is a high and dedicated undertaking is not to be questioned, and deserves the respect of all creeds. Yet however worthy the object, the First Amendment commands the State shall not participate.

What is true of the Catholic parochial school is equally true of many Protestant and Jewish day schools. They pursue the same mission and perform the same function for their faith as the parochial schools do for Catholicism.

Thus, a noted Protestant theologian said of the Protestant schools:

> Policywise, these schools fall into three general groups. The first maintains schools because it feels the necessity for doing so is implied in its theological point of view. The second appears to maintain its schools because of the close relationship between its doctrine, its religious practices, and the total culture in which it feels its children and youth must be nurtured. The third group maintains its schools because of the conviction that an education that is not permeated with religious values of a specific Christian sort tends to promote secularism and gives the pupil the idea that religion is a thing apart from the rest of his major concerns.[7]

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7. Wyckoff, *The Protestant Day School,* 82 School and Society 98, 99 (1955).

With respect to Jewish day schools, see *Symposium, the Jewish Day School in America: Its Theory and Practice*, 20 Jewish Education No. 1 (1948); Kaminetsky, *The Hebrew Day School Movement*, 82 *School and Society* 105 (1955). As one noted authority describes the process:

> Integration is incorporated into the subject matter as well. In the expressional arts, general and Jewish arts are combined and taught as one. Jewish history will encompass the history of the many people with whom the Jews came into contact. General geography will include the geography of Israel. The important events studied in the Bible, such as the Exodus from Egypt and the Revelation at Sinai, are associated with the emancipation of the peoples, and especially with the independence won by America, as well as with the doctrines of liberty and democracy that are universal in character and biblical in origin. In the domestic science laboratory nutrition and homemaking are taught along with the laws of Kashruth and Dietary observances.[8]

2. Because the court below granted the defendants' motion to dismiss on the merits, it must be assumed that at least some of the schools being financed under the Act include religion in the teaching of secular subjects.

The complaint in this case alleges in paragraph 13:

> On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are sectarian educational institutions which are (1) controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and

8. Goodside, *Religious and Secular Studies in the Day School*, 24 Jewish Education 55, 56 (1953). See also, Goodside, *Integration of Jewish and General Social Studies in the Day School*, 23 Jewish Education No. 2 (1951).

promotion of a particular religious faith, and (3) conduct their operations, curriculums and programs to fulfill that purpose.

Paragraph 18, setting forth the first cause of action, alleges that the Education Act in dispute is a law respecting an establishment of religion in that it "finances and participates in the blending of sectarian and secular instruction."

Because the case was decided on defendants' motions to dismiss the complaint, it must be assumed that blending of sectarian and secular instruction exists in parochial schools in Pennsylvania. *Cooper* v. *Pate*, 378 U. S. 546 (1964). The opinion of the court below expressly stated that "we accept as true all well-pleaded allegations of fact in the plaintiffs' complaint." Although the court refused to accept as admitted plaintiffs' allegations as a fact that the purpose and primary effect of the Act is to aid religion (also pleaded in par. 18) on the ground that the allegation "asserts not a fact but a conclusion of law and as such is not admitted for purposes of testing the sufficiency of the complaint," nowhere in the court's decision is there or could there be a finding that the factual allegation concerning the blending of sectarian and secular instruction is a conclusion of law.

It is true that the court did say

> As it may apply to sectarian institutions, we concur with the Supreme Court's statement in Allen, supra, that "we cannot agree * * * *either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion (emphasis added by court below).

However, this ignores the fact that the *Allen* case had been disposed of below on the plaintiffs' motion for judgment on the pleadings. It was thus the plaintiffs that had precluded proof on the purely factual issue of commingling of religious and secular instruction.

This is shown by the fact that, immediately following the language quoted by the court below, this Court pointed out that the case had come to it "after summary judgment entered on the pleadings," that there was nothing "in this record" to show that the supplied textbooks were used to teach religion and that "No evidence has been offered about particular schools, particular courses, particular teachers, or particular books" (392 U. S. at 248). Here, the plaintiffs are prepared to prove that the defendant schools, as well as others that are receiving or will receive aid under the Act, conduct their operations in such a manner as to propagate religion in the very operations financed by the state under the Act. Hence, the reliance on *Allen* by the court below was misplaced.

Moreover, the *Allen* case dealt only with textbooks, an item easily examined independently of other aspects of the teaching process. This Court noted that the New York Court of Appeals had construed the statute there challenged as requiring that the textbooks supplied by the state be strictly secular in character (392 U. S. at 245). Here we are dealing with the totality of instruction which must be sectarian at least in part, if the religious character of the school is to be maintained. A school which operates on the assumption that religion must be commingled with all aspects of instruction can still use purely secular textbooks but it cannot secularize its instruction.

It is true, as the court below said, that "the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines." But, as we have shown, some religious bodies that operate schools do not accept that assumption of secularity with respect to any subject. The subjects here involved can be and are taught with a view to propagating religion and the plaintiffs allege that they are so taught in nonpublic schools in Pennsylvania. And, as we shall now see, there is nothing in the decision below that precludes such commingling of the secular and the religious in the operations financed under the Act.

3. Nothing in the decision below bars the flow of funds under the Act to schools that commingle secular and sectarian teaching.

The Act provides state financing of instruction in four specified subjects—mathematics, modern foreign languages, physical science and physical education (Section 4). The only limitations that might be relevant here are (1) the provision in Section 3(3) that "Secular subject" means any course which is presented in the curricula of the state's public schools and shall not include "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," and (2) the provisions in Section 4 that only textbooks approved by the State Superintendent of Public Instruction are to be used, that a satisfactory level of pupil performance in standardized tests approved by the Superintendent be maintained and that, after five years, only certified teachers be used.

It does not appear that the state authorities administering the Act view these provisions as barring the payment of funds under the Act to schools that commingle sectarian instruction with the teaching of the four covered subjects. Nor are we referred to any regulation of the authorities administering the Act that imposes any such limitation. In order to qualify, a school need only establish it is teaching the four statutory subjects, that it is using approved textbooks, that its pupils are passing the standardized tests and that it is using approved teachers.

The court below noted that the Act "does not go so far as to encourage the teaching of religious matter." But it did not say that the statute does not finance religious instruction in the courses which it covers. And the complaint alleges that such financing is being undertaken under the Act.

We submit that affirmance of the decision below would leave the state free to finance all aspects of secular instruction whether or not it is commingled with sectarian instruction. It would permit the state to assume not only the cost of the salaries of teachers and ancillary personnel but also funding of buildings, equipment and supplies. We submit that nothing in the decisions of this Court in *Everson* and *Allen,* on which the court below principally relied, justifies that result.

B. Even if the Instruction Financed by the Act Is Purely Secular, the Act Assists the Propagation of Religion by Relieving Religiously Affiliated Schools of the Cost of Secular Instruction.

The act here under review is a product of a nation-wide drive to give assistance to church-affiliated schools by providing them with funds out of the public treasury. Indeed, what the Act does is to finance, at least in part, the salary and other costs of activities that the schools have been conducting all along, and must conduct in order to serve their intended functions. Hence, it is difficult if not impossible to avoid the conclusion that the aid supplied under the Act contributes to furthering the purpose of those schools. That purpose, of course, is the propagation of religion, as this Court noted in the portion of the opinion in the *Walz* case quoted above (p. 10).

The complaint here alleges that the defendant schools and other nonpublic schools in Pennsylvania "have as their purpose the teaching, propagation and promotion of a particular religious faith" (par. 13). But even if that were not so—and the teaching of secular subjects were now totally secular—the basic purpose of maintaining church-affiliated schools would still be religious indoctrination and the teaching of religion, at least as a separate subject, would continue. Indeed, if the claims of distress referred to in the legislative findings are to be believed, the religious instruction will continue only because the state aid is supplied.

The Act is thus a religious measure, not an educational measure. The principal support for it comes from those

religious bodies that operate their own schools, not from organizations concerned primarily with education. The purpose is to make possible continuation of sectarian religious instruction in church-affiliated schools.

At the least, then, it can be said that the purpose of the sponsors of the legislation is to foster religion. We submit that it is plainly also the purpose of the legislature that passed it. Although the legislative findings contained in Section 2 of the Act speak in terms of providing education for the child, what they actually say is that the state must make it possible to provide part of that education through the medium of the nonpublic school, including those that are established to propagate particular religious beliefs. This means that the legislative purpose is to finance continuation of this kind of religious institution.

The Act we submit has not only an impermissible purpose but also an impermissible effect. The clear, immediate impact of the Act, one stressed by its supporters, is that it makes possible the continuation of the aided schools and thus the continuation of religious instruction. The case for the kind of state aid given by the Act is that, without it (indeed, without a lot more of it), the whole complex of church affiliated schools will have to close. With it, they can remain open. What clearer demonstration of primary effect could be asked?

In short, by undertaking to "subsidize" the church affiliated schools, Pennsylvania "affirmatively foster[s]" them. Brennan, J., concurring in *Walz,* 90 S. Ct. at 1424.

This Court based its decision in *Allen* on its conclusion that "no funds or books are furnished to parochial schools,

and the financial benefit is to parents and children, not to schools" (392 U. S. at 243-244). Here, there is no question that there is a direct "financial benefit * * * to schools." We believe that any such benefit to an institution established to foster religion contributes to that purpose and is therefore a violation of the Establishment Clause. It is that conclusion, we believe, that underlies this Court's statement in *Everson* that "No tax * * * can be levied to support any religious * * * institutions, * * * whatever form they may adopt to teach * * * religion."

POINT II

Government financing of secular instruction in religiously affiliated schools, as provided in the Act, results in a commingling of church and state in a manner prohibited by the Establishment and Freedom of Religion Clauses of the First Amendment.

A. One of the Purposes of the First Amendment Was to Prevent the Entanglement of Government With Religion.

In its interpretation of the First Amendment in *Everson, supra,* this Court said (330 U. S. at 16):

> Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Critics of the "wall" concept have sought to undermine it by oversimplification—belaboring the obvious fact that it

is impossible (and undesirable) to bar all contact between religion and government. Plainly, such contact would be necessary, if only to protect religious freedom. What the "wall" concept does embody is both more narrow and more workable—a prohibition of government dependence on or interference with religion, and *vice versa.*

This is made clear in the most recent decision of this Court interpreting the First Amendment, *Walz* v. *Tax Commission, supra,* where it said (90 S. Ct. at 1411-12):

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Continuing, the Court said:

> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices *or have the effect of doing so.* Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward *government control of churches or governmental restraint on religious practice.* (Emphasis added.)

The Court then went on to assess the purpose of the tax exemption for churches which was there under review and

to hold that it was not to aid religion. It then said (90 S. Ct. at 1414):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an *excessive government entanglement with religion.* (Emphasis added.)

Similarly, Justice Brennan, in his concurring opinion, said (90 S. Ct at 1422):

> Although governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in extensive state involvement with religion.

Justice Harlan spoke in the same vein (90 S. Ct. at 1424):

> What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.

It was to prevent such state involvement with religion that this Court ruled last year that a state may not constitutionally involve itself in resolving a church property dispute on the basis of a civil court's interpretation of church doctrine. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U. S. 440 (1969). The Court said (at 449):

> If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.

See also *Schempp*, 374 U. S. at 222:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees * * *.

B. The Act Mandates an Impermissible Entanglement of Government With Religion.

In the words of the *Walz* decision, *supra*, "the end result" of the Act is "an excessive government entanglement with religion" (90 S. Ct. at 1414). In the tax exemption process reviewed in *Walz*, the government merely stood by, withholding use of its power to tax. Here, the government acts affirmatively to support religious institutions and simultaneously involves itself in their operations.

In *Walz*, this Court said (*ibid*) that it is relevant to consider

> * * * whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

No such "impermissible degree of entanglement" was found to exist in that case, and the Court noted in *Walz*,

that this was true also with respect to the bussing of children, upheld in *Everson*, and that there was no evidence in the record in the *Allen* case that the loan of textbooks involved impermissible entanglement. The situation is quite different where the state pays part of the necessary expenses of a church school, as part of a "contract" for the "purchase of secular educational services." Indeed, this Court expressly pointed out in *Walz (ibid)* that

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.

It is further noted in the Court's opinion that tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." Precisely the opposite is true of state financing of church schools.

Even those urging the constitutionality of the Act would, we believe, recognize that some degree of state supervision of the financed operations is unavoidable. This will include supervision designed to enforce the constitutional and statutory provisions which bar state support of sectarian instruction.

The *Allen* case makes it clear that state aid cannot be given to sectarian schools without regard to whether the aid advances religion. The textbook law there involved was upheld only upon a finding that only secular books would be lent and upon the conclusion there was no evidence that the books would be "instrumental in the teaching of religion" (392 U. S. at 248). The plain inference

is that the state cannot finance secular instruction if it is "instrumental in the teaching of religion." Thus, the state officials charged with the administration of the Act, even in the absence of specific statutory limitations, are under a constitutional obligation to see that instruction in the affected courses is secular.

This obligation is recognized to at least a minimum extent in Section 3(3) and Section 4 of the Act, described above. The necessity of this kind of supervision was referred to by Justice Harlan in his concurring opinion in the *Walz* case (90 S. Ct. at 1427):

> Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case.

The necessity of providing supervision to insure the secularity of financed operations has been recognized in some of the statutes enacted in other states granting financial aid to nonpublic schools. For example, Connecticut recently enacted a "Nonpublic School Secular Education Act" (Public Act 791, Conn. Laws 1969), providing for reimbursement by the state of a portion of the expenses of the textbooks and teachers' salaries for teaching secular subjects. The legislative findings (Section 2) note: "To the extent these church established schools teach secular subjects *in a secular manner,* they are entitled to the same assistance as other nonpublic schools" (emphasis added).

Consistently with this finding, the body of the statute defines the term "secular subject" as one in which "the manner of teaching does not indoctrinate, promote or prefer any religion or denominational tenets or doctrine," and as not including "any instruction in religious or demominational tenets, doctrine or worship" (§3(f)). Section 13 further provides that the secretary of the state board of education "shall make provision for visitation and inspection of every nonpublic school which applies for approval under this act and for the *visitation and inspection thereafter* as may be necessary to assure that said school is complying with good educational standards, meeting adequate safety, sanitary and construction requirements, and *fulfilling the requirements of this act.*" (Emphasis added.)

Rhode Island, in 1969, similarly provided for salary supplements for the teachers of "subjects required to be taught by state law *to the same extent as those subjects are taught* in public schools * * *" (R. I. Gen. Laws, §16-51-3, subd. 1 (Supp. 1969); emphasis added). Subdivision 4 of the same section requires that the teachers use "only teaching materials which are used in the public schools of the state." Subdivision 5 prohibits any teacher receiving salary supplements from teaching religion, even in a separate course.

A statute adopted in Ohio in 1969, also providing aid to nonpublic schools, provides that "to determine whether the services, materials and programs provided for the benefit of nonpublic school pupils pursuant to this division achieve the purposes of encouraging and enhancing the means of secular instruction and of promoting the continued availability of high quality general education in

nonpublic schools, the superintendent of public instruction shall periodically review courses of study, programs of student and teacher evaluation, and pupil achievement tests utilized in nonpublic schools" (Ohio Rev. Code §3317.06(H) (Supp. 1969)).

How, one may ask, can compliance be assured unless the state frequently sends representatives into the classrooms to see that no "subject matter expressing religious teaching" is introduced in Pennsylvania, that the "manner of teaching does not indoctrinate" in Connecticut, or that, in the day-to-day operations of nonpublic schools in Rhode Island, no teaching materials are used that are not used in the public schools? While one single examination of a textbook being considered for use is sufficient to ascertain whether or not it is sectarian, a teacher's classroom instruction and materials would require constant supervision as to their contents. How can there be an assurance that a teacher, teaching mathematics in a Catholic parochial school, will not use the mathematics example noted above, or will not use rosary beads for teaching counting? Similarly, how can the state be assured that the teacher of modern Hebrew in a Jewish day school in Pennsylvania does not include some reference to Jewish "forms of worship," precluded by the Act?

We do not mean to imply by these questions that every religious school, although aware of a requirement of secularity in state-financed courses, will strive to sectarianize them as far as possible. We assume a majority will not. But some may do so in gross form. Others will introduce practices that are arguably sectarian.

Who then will determine whether the fine line between sectarian and secular has been breached? Does this not, in the words of Justice Harlan, concurring in *Walz* (90 S. Ct. at 1426), "entangle government in difficult classifications of what is or is not religious?"

We recognize, of course, that the state must draw these lines in deciding on the curriculum and other practices in public schools. *Schempp* case, *supra*. This is quite different from placing itself in a supervisory and possible adversary position with respect to religious groups in the operation of *their* schools.

Among other things, such a situation would inevitably open the state to conflicting pressure from various religious and nonreligious groups not only as to the manner in which the responsibility of supervision is performed but also as to the choice of officials to be charged with that responsibility.

The involvement of the state in religion through these arrangements is paralleled by the correlative evil of loss of freedom on the part of the affected religious institutions. We have argued above that the Act, at least as construed by the court below, permits financing of religious schools without respect to whether they adhere in practice to the view that the tenets of their sect must be interwoven into all aspects of instruction. If that is not so, there is no avoidance of the other horn of the dilemma —permitting, if not, requiring the state to prohibit, and to police the prohibition of, such interweaving. We believe that the First Amendment was designed to prevent such commingling of state and religion—that it is essen-

tial to prevent "the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Walz* case, *supra*, 90 S. Ct. at 1412.

In sum, the dangers we have referred to above are precisely those which the First Amendment was designed to forestall. This was shown in Justice Rutledge's dissent in the *Everson* case (330 U. S. at 53-54):

> The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. Id., Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. Id., Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. Ibid. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. Id., Par. 11.

POINT III

Insofar as the Act authorizes the payment of public funds to private schools which are racially segregated, it violates the Equal Protection Clause of the Fourteenth Amendment.

A. The Private Schools Which Are Beneficiaries of Funds Under the Act Are Racially Segregated.

The allegations contained in the complaint, which must be taken as true in this phase of the case, include the following in paragraph 5:

> Non-public schools, including the defendant schools are, de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost or residential pattern, and the aid rendered to such schools will perpetuate and promote such racial segregation in that said subsidy will further enable private schools to increase their enrollment, which increase in enrollment will be exclusively or almost exclusively white, which, in turn, will increase the percentage of Negro enrollment in the public schools, thus aggravating said de facto segregation and, in turn, strengthening the preference of many white parents to enroll their children in non-public schools (by reason of the racial prejudice of said parents or because the public schools will necessarily become inferior by reason of obtaining a smaller percentage of the total funds which the community is prepared to commit for education), which will, in turn, generate political pressures for even greater tax aid to private schools, justified by their increased enrollment, with the ultimate result of promoting two school systems in the Eastern district of Pennsylvania—a public school system pre-

> dominantly black, poor and inferior, and a non-public school system predominantly white, affluent, and superior.

There is ample reason for believing that these allegations can be substantiated on trial. Thus, we note that the plaintiffs submitted a memorandum in the court below setting forth the specific information which they were prepared to offer in support of this allegation. This included evidence that the non-church-related schools in Pennsylvania and the non-Catholic church-related schools were all virtually 100 per cent white. The Catholic parochial school system, while it contains a substantial proportion of black students is nevertheless largely segregated. A very large proportion of the Catholic schools are either all white or all black.

Available evidence supports this allegation. The periodical *Commonweal* in its October 7, 1966 issue quoted the following statement of Richardson Dilworth, former Mayor and current School Board President in Philadelphia:

> Today, in our city, 40 per cent of the total school population is in parochial and private schools. The result is that while only 30 per cent of our city's population is non-white, 57 per cent of our public school pupils are non-white. And, today, there are more white children in parochial and private schools than there are in our city's entire public school system (page 13).

The following facts are set forth in the 1967 Report of the United States Commission on Civil Rights entitled "Racial Isolation in the Public Schools":

> Private and parochial school enrollment, which is overwhelmingly white, also is a significant factor in the

increasing separation of white and Negro school children. (page 31)

In 1960, of the more than four million pupils enrolled in non-public elementary schools in the United States, only 140,529 were non-white. 44,308 non-whites were attending non-public secondary schools which had a total enrollment of more than one million. (page 31, footnote 50)

Private and parochial school enrollment also is an important factor in the increasing concentration of Negroes in city school systems. Non-public school enrollment constitutes a major segment of the nation's elementary and secondary school population. Nationally, about one-sixth of the total 1960 school enrollment (Grades 1-12) was in private schools. In metropolitan areas the proportion is slightly higher, and divided unevenly between city and suburb. Nearly one-third more elementary school students in the cities attend nonpublic schools than in the suburbs. Almost all of them are white. In the larger metropolitan areas the trend is even more pronounced. * * * [A] much higher proportion of white city students than white suburban students attend private and parochial elementary schools. Nonwhites in these metropolitan areas, whether in cities or suburbs, attend public schools almost exclusively. (pages 38-39)

A table, following this statement, shows the following proportion of total elementary students, by race, in public and nonpublic schools, for 15 metropolitan areas in 1960:

Central Cities:	White	Nonwhite
Public Schools	61%	94%
Nonpublic Schools	39%	6%
Suburbs:	**White**	**Nonwhite**
Public Schools	75%	97%
Nonpublic Schools	25%	3%

(page 39)

The foregoing figures illustrate both for Pennsylvania and the whole area of the United States the well-known fact that the enrollment of Negro children in private schools is very low and far below the ratio of Negroes in the total population.

Among the reasons why few Negro children are found in private schools are the following: few Negroes are in a financial position to pay the tuition fees required by private schools. The Catholic parochial schools—the overwhelming majority of private schools[9]—attract mostly Catholic children and relatively few Negroes are Catholics. There are very few Negro Jews, as a result of which the Jewish day schools are virtually a hundred per cent white. Most private schools are situated in white neighborhoods, which makes attendance by Negro children inconvenient. Negroes prefer to send their children to public schools where racial discrimination is prohibited by the Equal Protection Clause of the Fourteenth Amendment. (The Pennsylvania Fair Educational Opportunities Act prohibiting discrimination in private education and providing for machinery to enforce such prohibitions does not generally apply to elementary and secondary schools. 24 P.S. (Purdon) §5001, *et seq.*)

The financial aid granted to private schools by the Act makes these schools less dependent on the tuition fees paid by the parents of children attending private schools. To the extent that these schools are able to maintain tuition

9. Of the pupils in nonpublic schools in Pennsylvania, 96.6% attend church-affiliated schools. See text at footnote 1.

fees on a relatively low level as a result of the public subsidy they receive, there will be a further movement from the public school system to the private schools.

In sum, the percentage of white children in public schools is considerably lower that it should be on the basis of the white-black ratio in the population. Many public schools, even in racially mixed neighborhoods, are becoming Negro schools because of the movement of white children to private schools. This leads, in effect, to a dual system of schools, the public schools attended predominantly by blacks and the private schools, including parochial schools, attended predominantly by whites.

B. The Use of Public Funds to Maintain and Perpetuate Racial Segregation Is Prohibited.

In *Brown* v. *Board of Education of Topeka,* 347 U. S. 483 (1954), this Court declared racial segregation in public education to be a denial of the equal protection guaranteed by the Fourteenth Amendment. It held unconstitutional the dual system under which whites and Negroes were required to attend different schools in a number of Southern states. A year later, in its implementing order, this Court required public school boards to abolish such dual school systems and to effectuate the transition to racially non-discriminatory school systems. 349 U. S. 294, at 301 (1955). In subsequent decisions, this Court reaffirmed its decisions in *Brown I* and *Brown II* and made it clear that the time has run out for efforts to delay school integration. *Cooper* v. *Aaron,* 358 U. S. 1 (1958); *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964); *Green* v. *County School Board of New*

Kent County, 391 U. S. 430 (1968); *Raney* v. *Board of Education of the Gould School District*, 391 U. S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.*, 391 U. S. 450 (1968); *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 19 (1969).

In *Brown I*, this Court based its conclusion that the dual system is unconstitutional on the discrimination which is inherent in a separation of pupils by race. The Court said (374 U. S. at 494):

> To separate them [Negro pupils] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

This Court has not yet decided the question whether a school system which does not require whites and blacks to attend different schools but where, as a result of a segregated residential pattern, white and black pupils to a large extent attend different schools, amounts to a dual system which is in conflict with the Equal Protection Clause of the Fourteenth Amendment as interpreted in *Brown I* and *II*. This is the problem of the so-called "*de facto*" segregation. Those who believe that such *de facto* segregation is unconstitutional, as the *amici* herein do, base their view on the above-cited language in *Brown I* which described the evils of racial separation and the discrimination which it creates in general terms without distinguishing among the causes for such separation. Further, they believe that the requirement of discriminatory state action as a prerequisite for the application of the Fourteenth Amendment, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948),

is fulfilled because the state is responsible for having set up a school system based on the neighborhood principle from which the racial segregation flows.

There have been a number of court decisions holding that segregation in public education which is the result of the residential pattern is in violation of the Fourteenth Amendment. See for example *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543 (D. Mass. 1965), *rev'd on other grounds*, 348 F. 2d 261 (1st Cir. 1965); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Jackson* v. *Pasadena City School District*, 31 Cal. Rptr. 606, 382 P. 2d 878 (1963); *Blocker* v. *Board of Education of Manhasset*, 226 F. Supp. 208 (E.D.N.Y. 1964); *Branche* v. *Board of Education of Hempstead*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Booker* v. *Board of Education of Plainfield*, 45 N.J. 161, 212 A. 2d 1 (1965); *Brewer* v. *School Board of the City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968); *Spangler* v. *Pasadena City Board of Education*, U. S. District Court for the Central District of California, Civil Docket No. 68-1438-R, filed January 20, 1970; and *Crawford* v. *Board of Education of the City of Los Angeles*, California Superior Court for the County of Los Angeles, Civil Docket No. 822-854, filed February 11, 1970.

On the other hand, three Federal Courts of Appeals have reached the opposite conclusion, on the ground that such segregation is a result of fortuitous circumstances (residential patterns) with no state action involved so that the Equal Protection Clause does not come into play. In the view of these courts, the school authorities have no

obligation to eliminate *de facto* segregation which has been brought about without the active involvement of the state. *Bell* v. *City of Gary, Indiana,* 324 F. 2d 209 (7th Cir.), *cert. denied,* 377 U. S. 924 (1964); *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir.), *cert. denied,* 380 U. S. 914 (1965); *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), *cert. denied,* 389 U. S. 847 (1967), 419 F. 2d 1387 (6th Cir. 1969).

In the court below, defendants relied on the 1966 decision in *Deal* to support their view that a statute which provides financial aid to private, including parochial, schools does not violate the Fourteenth Amendment. They view the racial segregation which results from the existence of private schools, including parochial schools, as described above under sub-point A, as constitutionally of the same nature as segregation resulting from neighborhood schools, namely, as a type of segregation not based on state action and therefore outside the province of the Fourteenth Amendment.

However, plaintiffs in this action do not attack the pattern of segregation which results from the operation of private schools, *per se.* The thrust of their complaint is directed against the state which, by providing financial aid to private schools and thus helping to maintain and perpetuate the pattern of segregation resulting from the existence of these schools, engages in discriminatory state action.

There is no question that the authorized payment of public monies is state action. *Cooper* v. *Aaron,* 358 U. S. 1, 19 (1958); *Poindexter* v. *Louisiana Financial Assistance*

Commission, 258 F. Supp. 158, 162 (E.D. La. 1966); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 854 (E.D. La. 1967), *aff'd*, 389 U. S. 571 (1968). See also 79 HARV. L. REV. 841 (1966). It is direct state action, not indirect, as defendants in their brief below seem to suggest. In fact, it is hard to imagine any action which can be attributed to the state more closely and intimately than the authorized payment of state funds. The crucial question then is whether payment of state funds to private, including parochial schools, under the Act is *discriminatory* state action.

There is ample authority for the proposition that public aid to private schools or to pupils attending private schools which serves to support racially segregated education constitutes denial of equal protection in violation of the Fourteenth Amendment. This Court said in *Cooper* v. *Aaron*, *supra* (358 U. S. at 19):

> State support of segregated schools through any arrangement, management, *funds* or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

Repeatedly, Federal courts have struck down on the same ground state plans to provide for tuition grants for students attending private schools. *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U. S. 569 (1961); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U. S. 515 (1962); *Poindexter* v. *Louisiana Financial As-*

sistance Commission, supra; *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969).

The principle that the use of public funds to support activities by private persons or groups which involve racial discrimination denies equal protection is applied also in fields other than education. See e.g., *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963);[10] *Ethridge* v. *Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967). And see Executive Order No. 11246, September 28, 1965, 30 F.R. 12319, on equal employment opportunity, and Executive Order No. 11063, November 24, 1962, 27 F.R. 11527, on equal opportunity in housing.[11]

In some of the cases cited above, the courts found that grants of public funds to educational institutions were made for the purpose of evading desegregation of public schools and perpetuating racial segregation. But such a discriminatory purpose is not a prerequisite for holding that a grant to an educational institution is in violation of the Equal Protection Clause. All that is required is that

10. In *Simkins*, Negro physicians complained that government funds were given to two hospitals which discriminated against them because of their race and also discriminated against Negro patients because of their race. They did not seek an injunction against public support of discrimination or segregation, but an injunction against the discriminatory conduct of the recipients of the funds. In the present case, in contrast, plaintiffs do not seek an injunction against discriminatory conduct of the schools, but an injunction against state support of discrimination. Either remedy is suitable to eliminate a violation of the Fourteenth Amendment's prohibition to use public funds to maintain racial discrimination and segregation.

11. That the payments authorized by the Act are actual grants and not payments under a contract to purchase secular educational services as suggested by the language of the bill, has been succinctly demonstrated by Judge Hastie in his dissenting opinion in the court below.

the grant has the effect of maintaining or perpetuating segregation.

In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961), this Court said expressly:

> * * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them *whatever the motive may be*. It is of no consolation to an individual denied the protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend on such a distinction (emphasis added).

And see cases there cited (*id.* at 725, n. 2).

Applying this principle, it was held in *Poindexter II*, *supra*, that the fact that grants to private schools had the effect of "assisting whites to flee to private schools," 275 F. Supp. at 856, provided an independent ground for the holding that the state law authorizing such grants was unconstitutional. After stating that the purpose of the Act involved in that case was discriminatory, the court continued: "We hold *also* that Act 147 of 1962 is unconstitutional in its actual effect." *Id.* at 857 (emphasis added).

Hence, all that plaintiffs in the present case have to allege—as they have done—and to prove—which they are prepared to do if and when the case goes to trial—is that aid given to nonpublic schools, including parochial schools, under the Act promotes racial discrimination and segregation in the defendant schools. It can be said, in addition, that the effect of the Act is to "encourage" parents of white children to leave public schools and thus to aggravate

and perpetuate patterns of racial segregation in education. See *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

Returning to *Burton, supra*, defendants in their brief submitted to the court below cited the language in that decision stating that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." 365 U. S. at 722.

The "significant involvement" doctrine of *Burton* would apply in the present case only if plaintiffs sought a judgment restraining defendant schools from discriminating or segregating on a racial basis. Only then would the question arise as to whether the state involvement in the school operation as a result of its providing funds is so significant that such operation becomes state action. But the thrust of the complaint in the present case is directed at the *state* because of the aid it gives to those schools; as mentioned before, there can be no question that such aid constitutes state action regardless of whether the amounts given are small or large. (See *Poindexter II, supra*, where it was said that "the payment of public funds *in any amount* through a state commission under authority of a state law is undeniably state action." 275 F. Supp. at 854 (emphasis added)).

Quite apart from that, it cannot be gainsaid that the assistance given to private (including parochial) schools under the Act is "significant" under any meaning of this term. The complaint alleges in paragraph 16 that the seven defendant schools have applied for payment under the Act

in the total sum of over $270,000, and that other private and sectarian educational institutions have applied for payments under the Act in the total amount of $16,833,884.32. The very purpose of the enactment, expressed in its preamble, that is, to alleviate the burdens borne by the private schools in Pennsylvania, establishes the significance of the state support of private schools as authorized by the enactment. If these grants are significant in supporting the operation of those schools, they also thereby significantly contribute to the maintenance and perpetuation of the segregated pattern which permeates these schools.

POINT IV

Plaintiffs have standing to raise the question of equal protection.

The court below never reached the question whether the state by providing public funds to private schools which are largely segregated, violates the Equal Protection Clause of the Fourteenth Amendment because it denied all plaintiffs standing to raise this issue. The *amici* disagree with this ruling for the following reasons:

One of the plaintiffs, Alton J. Lemon, is the father of a Negro child attending a public school in Pennsylvania. It is alleged in the complaint that the effect of the assistance given to private schools under the Act is to promote the dual system of education in Pennsylvania consisting, on the one hand, of a string of private schools predominantly white, affluent and superior and, on the other hand, of the public school system predominantly black, poor and inferior. It has also been alleged that the result of the

aid given to private schools is a continuing flight of white students from public schools to private schools, thus aggravating even more the pattern of segregation. It follows that young Lemon, whose father is one of the plaintiffs acting in his behalf, is directly and personally affected by the operation of the Act authorizing the state to grant financial assistance to private schools. The effect which the support of private (including parochial) schools under the Act has on the racial composition of public schools is not hypothetical, but actual and present, according to the allegations of the complaint.

It follows that plaintiff Lemon in this action vindicates the constitutional right of his child not to be subjected to segregated education. Hence Mr. Lemon has standing under the basic rule that a person may vindicate his own constitutional rights. *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953). See also *Poindexter I*, *supra*, and *Griffin* v. *State Board of Education*, 239 F. Supp. 560, 562 (E.D. Va. 1965); see also Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 952-54 (1968). Mr. Lemon's position in this matter is no different from that of plaintiffs in *Alexander* v. *Holmes County Board of Ed.*, *supra*, and the other cases on desegregation and integration decided by this Court [illegible] es, plaintiff Negroes claimed that [illegible] n were directly affected by discrimina[illegible] in public schools. Like the plaintiffs in t[illegible] mon and his child have "a personal st[illegible] the controversy." *Baker* v. *Carr*, 369 U[illegible] 2), cited in *Flast* v. *Cohen*, 392 U. S. 83, 9[illegible]

Therefore there is no need in the present case to carve out a special exception to the general rule as was done in *Barrows* v. *Jackson* where a white person was granted standing to complain that the enforcement of a restrictive covenant against a Negro deprived the latter of the equal protection of the laws. Instead, the general rule applies, under which a person may claim standing in this Court to vindicate his constitutional rights.

If Mr. Lemon has no standing to bring the present action, there would be no possible way of contesting the grants made under the Act on the ground that they constitute a violation of the equal protection of Negro children in the public schools. Obviously, neither the schools which received state aid nor the children attending such schools can be expected to contest the granting of such aid.

Maintenance of constitutional government requires that there be *some* way of testing the constitutionality of laws and administrative acts. Otherwise the very foundation of our Constitution would be subverted. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

The rules governing standing should be given a liberal interpretation to facilitate the review of laws and administrative acts as to their constitutionality. It is for these reasons that the *amici* believe that all plaintiffs in the present case should be held to have standing to raise the constitutional question based on the Equal Protection Clause.

Conclusion

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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